STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2004
v	No. 244115 Washtenaw Circuit Court
ERIC RAY PETHOUD, Defendant-Appellant.	LC No. 01-002000-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. Overview

Defendant Eric Pethoud appeals as of right from his conviction, following a jury trial, of breaking and entering a building with the intent to commit a larceny, MCL 750.110. We affirm.

II. Basic Facts And Procedural History

The testimony at Pethoud's trial established that a student of the University of Michigan (U of M) saw a figure entering a window near the kitchen area of the West Quad while taking a study break sometime between 2:00 and 2:30 a.m. on December 18, 2001. After the student called 911, Officers Pressly and West of the U of M Department of Public Safety were dispatched to the area. Upon arriving, Officer Pressly saw Pethoud walking through the North Archway, an entry to the West Quad, carrying a bag that Pethoud then sat on the ground. Officer Pressly stopped Pethoud, and Officer West looked inside the bag and found a scale. Thereafter, Officer West and an officer that arrived later, Officer Mundt, searched the lower level of the West Quad area and found an open, damaged window leading into the West Quad kitchen. They did not find anyone else in either the West Quad or the kitchen area. James Kluck, the former manager of the West Quad dining service who supervised Pethoud when he worked at U of M, testified at trial that the scale's serial numbers matched those listed on a packing slip for a scale that he had purchased on behalf of U of M.

III. Mistrial

A. Standard Of Review

Pethoud asserts that the trial court erred by denying several motions for a mistrial made by his trial counsel. We review a trial court's denial of a motion for a mistrial for an abuse of discretion.[1] A trial court should only grant a mistrial when there is "an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial."[2]

B. Officer Pressly's Testimony

Pethoud argues that the trial court abused its discretion by denying his motion for a mistrial, which was based on Officer Pressly's testimony that Pethoud asserted his rights to an attorney and to remain silent upon being arrested and informed of his *Miranda*[3] rights. Specifically, Pethoud's argument is premised on the following exchange:

> Prosecutor: Now, during the arrest process, I think you testified that you did inform [Pethoud] of his [*Miranda*] rights, the so-called [*Miranda*] warnings?
>
> Pressly: Correct. At about 2:40 that morning. I read him [*Miranda*] rights that we are – from a supplied card that we are given at the department. At that time, [Pethoud] said that he wanted an attorney, so I didn't ask him any more questions relevant to the crime. The only other questions I would have asked him would have been his name and et cetera, date of birth, stuff that we needed for the report but nothing to do with the crime.

"[T]he use of a criminal defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' for impeachment purpose violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution."[4] This case is analogous to *People v Dennis.* In *Dennis*, the Michigan Supreme Court found no error requiring reversal when a police officer, in response to the prosecutor's question about what type of follow-up investigation he had done after arresting the defendant, stated that he had attempted to interview the defendant but that the defendant had refused to be interviewed until after speaking with an attorney.[5]

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[1] *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

[2] *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] *Dennis, supra* at 573, quoting *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

[5] *Dennis, supra* at 570.

First, as with the officer's statement in *Dennis*, Officer Pressly's testimony concerning Pethoud's having exercised his rights to remain silent and to an attorney was limited in nature, consisting only of a single reference. Second, "*Doyle* prohibits 'the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings . . . .'"[6] Here, as in *Dennis*, Pethoud did not testify at trial. Therefore, Officer Pressly's testimony "could not possibly have been used against [the] defendant for impeachment purposes."[7]

Moreover, as in *Dennis*,[8] it is not evident here that the prosecutor's question was aimed at eliciting a statement from Officer Pressly concerning Pethoud's invocation of his *Miranda* rights. Pethoud attempts to distinguish the present case from *Dennis* by asserting that the prosecution *did* intend to elicit Officer Pressly's statement on this subject. Pethoud argues that he did not make a statement to the police that the prosecution sought to enter into evidence. Therefore, he asserts, there was no reason for the prosecutor to inquire whether he had been read his *Miranda* rights other than to elicit the fact that he had invoked them.

It is true that the prosecutor did not seek to introduce a statement by Pethoud into evidence, and there was therefore no need to lay a proper foundation for the introduction of the statement. However, it was not improper for the prosecutor to ask Officer Pressly whether he had read Pethoud his rights as part of the arrest process. While we agree that the prosecutor's question here is distinguishable from the question posed in *Dennis*, the distinction makes the question posed here *more*, rather than less, appropriate. Specifically, the prosecutor in *Dennis* asked the officer what "type of investigation follow-up" he had done with regard to the case. The Supreme Court determined this question to be "open-ended" and "inartfully phrased."[9] Indeed, in discussing the question, the Supreme Court specifically noted that prosecutors have a duty to carefully question witnesses, specifically to avoid open-ended questions, in order to avoid improper, unforeseen testimony.[10] By contrast, the prosecutor's question here was not inartfully phrased and was not open-ended. Rather, the prosecutor's question was closed-ended, requiring only a yes or no response. This made Officer Pressly's injection of the improper testimony *less*, rather than more, foreseeable.

As in *Dennis*, apart from the single instance of unsolicited testimony by Officer Pressly, the prosecutor did not call attention to Pethoud's silence at the time of arrest or attempt to elicit any further testimony concerning Pethoud's invocation of his *Miranda* rights. Pethoud asserts that the prosecutor, during his closing arguments, improperly commented on Pethoud's failure to testify at trial. However, this presents a separate issue because the challenged comments did not

[6] *Id*. at 578, quoting *Doyle*, *supra* at 619 (bracketed insertion in opinion).

[7] *Dennis*, *supra* at 578.

[8] *Id*. at 571, 574-575.

[9] *Id*. at 575.

[10] *Id*. at 575 n 6.

involve the prosecutor's further reference to Pethoud's invocation of his right to remain silent "'at the time of arrest and after receiving *Miranda* warnings'" as discussed in *Dennis.*[11]

Finally, in *Dennis*, the Supreme Court noted that the trial court had given "a forceful curative instruction to the jury that defendant saying he wanted a lawyer and did not wish to talk with the officer 'cannot be used against you in any way and is not an indication of anything.'"[12] The Supreme Court considered this instruction significant because it prevented the defendant's postarrest silence from being submitted to the jurors as evidence from which they could draw permissible inferences[13] and because jurors are normally presumed to have followed instructions to disregard inadmissible evidence that has been inadvertently presented to them.[14]

Here, the trial court twice offered to issue a curative instruction, and defense counsel twice stated that he did not wish the trial court to issue one. The "'failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.'"[15] Here, defense counsel not only failed to request a curative instruction, but also affirmatively asked the trial court not to do so. This Court has recognized the general rule that error requiring reversal cannot be an error to which the aggrieved party contributed by plan or negligence and, therefore, a party that does so waives review of the issue.[16] We conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

C. Kluck's Testimony

Pethoud asserts that the trial court erred by allowing Kluck to testify that he believed that Pethoud had an explosive personality and that a personality conflict between Pethoud and the supervisor of a food services unit at U of M had resulted in disciplinary action. Pethoud also asserts that the trial court erred by denying his subsequent motion for a mistrial based on the testimony. As with a denial of a motion for a mistrial,[17] we review a trial court's decision to admit evidence for an abuse of discretion.[18]

Having reviewed the record, we find that the trial court did not abuse its discretion either in allowing Kluck to present the testimony or in denying Pethoud's motion for a mistrial. During his cross-examination of Kluck, defense counsel asked, "And it's fair to say that [Pethoud] was a

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[11] *Id*. at 573, quoting *Doyle, supra* at 619.

[12] *Dennis, supra* at 578.

[13] *Id.*

[14] *Id*. at 581, citing *People v Greer*, 483 US 756, 767 n 8; 107 S Ct 3102; 97 L Ed 2d 618 (1987).

[15] *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999), quoting MCL 768.29 and citing *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

[16] *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

[17] *Dennis, supra* at 572.

[18] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

good employee for you?" Over the prosecutor's objection that the question impermissibly sought the introduction of character evidence, the trial court allowed Kluck to answer the question based on defense counsel's assertion that it was aimed at discovering any potential bias that Kluck might have against Pethoud. Kluck then stated that Pethoud's work performance was very good. On redirect examination, the prosecutor stated that it appeared that Kluck had qualified his answer and asked him to expound. The trial court allowed Kluck to deliver his "personality" testimony despite defense counsel's assertion that it was irrelevant.

Evidence showing that a witness is potentially biased or prejudiced is always relevant for the jurors to consider the witness' credibility.[19] Moreover, MCR 611(b) provides that a witness may be cross-examined as to credibility. Thus, the trial court properly allowed defense counsel to ask Kluck whether Pethoud was a good employee. Kluck responded to defense counsel's question that he thought Pethoud's work performance was very good; however, defense counsel's inquiry into whether Kluck considered Pethoud to be a good employee was not limited to his work performance. Thus, in asking Kluck to expound upon his answer, the prosecutor only sought to elicit further testimony as to whether Kluck was biased against Pethoud. Such evidence is always relevant.[20]

In addition, it was defense counsel who initially sought this evidence. Thus, by raising the issue of whether Pethoud was a good employee, defense counsel "opened the door to a full and not just selective development of the subject."[21] Moreover, error requiring reversal cannot be predicated upon an error to which the aggrieved party contributed by plan or negligence.[22] Defense counsel should have been aware that asking whether Pethoud was a good employee was likely to elicit testimony that reflected negatively on Pethoud. Thus, defense counsel contributed to the elicitation of the testimony by raising the issue.

D. Officer Shannon's Testimony

Pethoud's next assertion of error is based upon the testimony of Officer Timothy Shannon, who testified that he had executed a search warrant at Pethoud's home. The prosecutor then showed Officer Shannon a photograph and asked whether he had taken it while in Pethoud's home executing the warrant. In response, Officer Shannon stated:

> It is. When I went to the apartment, I usually will take photographs when I first enter to determine if there's something of evidentiary value that I'm looking for. In this case, I was searching for another food scale in the search warrant. That's what we had listed, but what I noticed when I entered the bedroom was a small

[19] *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

[20] *Id*. at 72.

[21] *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993).

[22] *Gonzalez, supra* at 224.

> brown case that would contain – it was that which is similar to hold a flashlight, a small –[23]

Officer Shannon later testified that the photograph was of a case that is similar to the ones in which a flashlight found by Officer Pressly on the night Pethoud was arrested would be packaged.

Pethoud asserts that the trial court abused its discretion by denying his motion for a mistrial based on Officer Shannon's testimony that he was looking for another scale listed in the search warrant, asserting that it was impermissible under MRE 404(b)(1) as evidence of another crime, wrong, or act. Pethoud also asserts prosecutorial misconduct based on Officer Shannon's statements.

We conclude that Pethoud's reliance on MRE 404(b)(1) is without merit. MRE 404(b)(1) provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Here, Officer Shannon's testimony did not mention another crime, wrong, or act by Pethoud, nor was it offered to show that Pethoud acted in conformity with such other conduct.

Even assuming that Pethoud is correct in asserting that Officer Shannon's testimony was prejudicial, "prosecutorial misconduct cannot be predicated on a good-faith effort to admit evidence."[24] Here, Officer Shannon's statement concerning his efforts to find another scale was not elicited by the prosecutor but, rather, was volunteered during the prosecutor's efforts to lay a foundation for the photograph of the flashlight case. Thus, we conclude that no prosecutorial misconduct occurred.

We also conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. Although Officer Shannon's testimony was arguably prejudicial, this Court has recognized that "not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, 'an unresponsive, volunteered answer to a proper question is not grounds for granting a mistrial.'"[25] This situation is again analogous to the situation in *Dennis*[26] in that the testimony was limited in nature, not elicited by the prosecutor, and not used against Pethoud.[27] Moreover, the trial court's failure to provide a curative instruction does not merit reversal of Pethoud's conviction. Despite asserting that Officer

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[23] Apparently, the police believed that another breaking and entering involving the theft of another food scale had occurred. However, no charges were filed against Pethoud relating to another crime. No testimony concerning another breaking and entering was introduced at defendant's trial, nor was any other testimony concerning another scale.

[24] *People v Noble*, 238 Mich App 647, 666; 608 NW2d 123 (1999).

[25] *Griffin, supra* at 36, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

[26] *Dennis, supra* at 570.

[27] *Id*. at 583.

Shannon's testimony was prejudicial to Pethoud and moving for a mistrial, defense counsel did not request a curative instruction. The "'failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.'"[28]

IV. Prosecutorial Misconduct

A. Standard Of Review

Pethoud asserts two instances of misconduct on the part of the prosecutor during his closing arguments; one in which he asserts the prosecutor improperly attacked defense counsel and another in which he asserts that the prosecutor improperly mentioned that Pethoud did not testify at trial. Pethoud also alleges that the trial court abused its discretion by denying his motion for a mistrial based on the remarks. A claim of prosecutorial misconduct presents a constitutional issue that we review de novo to determine whether the defendant was denied a fair and impartial trial.[29] Pethoud failed to preserve his claims of prosecutorial misconduct because he neither objected to the prosecutor's comments at the time they were made nor requested curative instructions, instead waiting until after the trial court had delivered the jury instructions and moving for a mistrial.[30] Thus, our review of Pethoud's claim of prosecutorial misconduct is limited to plain error, and reversal is only warranted if the error resulted in his conviction despite his innocence or seriously affected the fairness, integrity, or public reputation of his trial.[31] Moreover, error requiring reversal will not be found where any prejudicial effect could have been alleviated by a curative instruction.[32]

The test for prosecutorial misconduct is whether the defendant was denied a fair trial.[33] The pertinent portion of the record must be examined, and the prosecutor's remarks evaluated in context.[34] The propriety of the remarks depends on the particular facts of each case, and the remarks "must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial."[35] Also, remarks by the prosecutor that would otherwise be improper may not require reversal if they are made in response to issues raised by the defense.[36]

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[28] *Griffin*, *supra* at 37.

[29] *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

[30] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[31] *Id.*, citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

[32] *Id.*

[33] *Noble*, *supra* at 660.

[34] *Callon*, *supra* at 330.

[35] *Id.*

[36] *Id.*

B. Derogatory Remarks

Pethoud argues that reversal is required based on the prosecutor's derogatory remarks regarding defense counsel. However, our review of the record indicates that the challenged remarks were made in response to comments that defense counsel made during his rebuttal closing argument. Moreover, even if we were to view these remarks as improper, they do not rise to the level of constituting plain error. Further, any potential prejudicial effect could have been alleviated by a curative instruction had one been requested.

C. Failure To Testify

Pethoud's assertion that the prosecutor improperly remarked upon his failure to testify is based on the prosecutor's statement that "there is no evidence of where he was, where he was going, where he had been. When I say 'he,' I mean [Pethoud]. There's no evidence before you about that." It is true that "a prosecutor may not comment on a defendant's failure to testify or present evidence, i.e., the prosecutor may not attempt to shift the burden of proof."[37] However, even if the prosecutor's comments were to be viewed as a reference to Pethoud's failure to testify or present evidence, such comments, although otherwise improper, do not require reversal where they are made in response to an exculpatory theory presented by the defendant.[38]

The prosecutor's comments, while they might otherwise have been improper, were not improper here because they were made in response to defense counsel's attempt to create reasonable doubt. Defense counsel implied during his closing arguments that the prosecutor had failed to rebut the theory that Pethoud was in the West Quad at the time of his arrest merely because he lived near the West Quad and was walking home. Further, any potential prejudice was dispelled by the trial court's instruction to the jurors that Pethoud had the right not to testify and that they could not allow his refusal to testify to affect their verdict.[39] We conclude that the trial court did not abuse its discretion by denying Pethoud's motion for a mistrial.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

[37] *Abraham*, *supra* at 273.

[38] See *People v Vaughn*, 200 Mich App 32; 504 NW2d 2 (1993).

[39] *Abraham*, *supra* at 276.